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Supreme Court, U.S.
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No. 02-220

IN THE

Supreme Court of the United States

CARMEN HOOKER ODOM, Secretary of the North Carolina Department of Health and Human Services, *ET. AL.*,

Petitioners,

v.

SAMUEL ANTRICAN, minor; ALANA ANTRICAN, minor, by their next friend Angela Antrican, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

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October 2, 2002

8 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. IN GENERAL, FOR CLAIMS OF STATUTORY VIOLATIONS BROUGHT PURSUANT TO § 1983, THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER JURISDICTION UNDER *EX PARTE YOUNG* CAN BE DETERMINED WITHOUT FIRST DETERMINING THAT THE STATUTE AT ISSUE CREATES ENFORCEABLE RIGHTS 1

II. IN PARTICULAR, FOR CLAIMS OF MEDICAID EPSDT VIOLATIONS BROUGHT PURSUANT TO § 1983, THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER A CLAIM BASED UPON LACK OF "EFFECTIVE" INFORMING ABOUT EPSDT IS JUSTICIABLE UNDER *EX PARTE YOUNG* 4

CONCLUSION 5

TABLE OF AUTHORITIES

CASES

Blessing v. *Freestone*, 520 U.S. 329 (1997) 4

Frazar v. Gilbert, 300 F.3d 530 (5th Cir. 2002) .... *passim*

Lelsz v. Kavanagh, 807 F.2d 1243 (5th Cir. 1987) 3

Verizon Maryland Inc. v. Public Service Comm'n of Maryland, 122 S. Ct. 1753 (2002) 2,3

STATUTES

42 U.S.C. § 1983 ..... *passim*

This petition clearly warrants review. The States have a strong interest in the resolution of both the broad and the particular issues arising out of the decision below. Whether 42 U.S.C. § 1983 may be used to overcome Eleventh Amendment immunity for statutory claims without any judicial determination that individually enforceable federal rights are at issue is a question that can only be settled by this Court.

I. IN GENERAL, FOR CLAIMS OF STATUTORY VIOLATIONS BROUGHT PURSUANT TO § 1983, THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER JURISDICTION UNDER *EX PARTE YOUNG* CAN BE DETERMINED WITHOUT FIRST DETERMINING THAT THE STATUTE AT ISSUE CREATES ENFORCEABLE RIGHTS.

Respondent[1] appears not to appreciate that *Frazar v. Gilbert*, 300 F.3d 530 (5th Cir. 2002) is a *jurisdictional* decision. The decision is based upon limitations on the jurisdiction of federal courts under the Eleventh Amendment. It was precisely because the state defendants in *Frazar* argued the district court's enforcement of a consent decree ran afoul of the Eleventh Amendment that the Fifth Circuit had appellate jurisdiction.

The court's *holdings* were jurisdictional: "We vacate the orders because the court has exceeded its jurisdiction," *id.*

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[1] Only respondent Arielle McCree remains a plaintiff below. All other respondents have been dismissed.

at 533; "[W]e hold that the court lacks jurisdiction to cure the problems or to direct the particular means and methods of this care," *id.*; "The district court's authority to enforce the consent decree is further limited by the Eleventh Amendment," *id.* at 540; and "The Eleventh Amendment limits that jurisdiction to the enforcement of federal rights," *id.* at 543.

The *Frazar* decision, completely at odds with the Fourth Circuit decision below, unmistakably decides that federal courts lacks jurisdiction over a claim of a statutory violation brought under § 1983 unless the federal statute at issue creates enforceable rights:

> In short, so far as we can tell from this record, plaintiffs have not established any violations of the EPSDT provisions of the Medicaid statute which are actionable under § 1983 and the Ex Parte Young exception to the Eleventh Amendment.

Id. at 548.

Respondent errs in thinking this is a "merits" issue resolved against petitioners in *Verizon Maryland Inc. v. Public Service Comm'n of Maryland*, 122 S. Ct. 1753 (2002). In *Verizon* this Court sustained federal jurisdiction because the question was whether a state commission's order was pre-empted by federal law. That is a far different question than whether a federal statute creates personal rights enforceable against state officials.

Moreover, *Verizon's* comment that inquiries into whether actions lie under *Ex parte Young* do not include analyses of the merits of the underlying claims, *id.* at 1761, responded to a suggestion that the commission's order may not have been inconsistent with federal law at all. *Verizon* might well resolve the present petition if petitioners simply argued that respondent's allegations do not amount to a violation of a federal statutory requirement. If that were the sole allegation, then *Verizon* teaches that ordinarily the merits of the underlying claims are ignored in making jurisdictional determinations under *Ex parte Young*.

However, petitioners' contention herein is quite different. Petitioners contend, consistent with the Fifth Circuit's decision in *Frazar*, that whether a federal statute creates enforceable rights - which is *not* an inquiry into the merits of whether state officials have violated the alleged rights - is necessarily a part of the jurisdictional inquiry under *Ex parte Young*.

The basis for this contention is, of course, the fact that the *Ex parte Young* fiction exists solely to constitutionally accommodate the tension between the supremacy of federal law and Eleventh Amendment immunity. The only legitimate basis for federal court jurisdiction over state officials in their official capacities, consistent with the Eleventh Amendment, is the vindication of federal rights. *Frazar*, 300 F.3d at 541 (quoting *Lelsz v. Kavanagh*, 807 F.2d 1243, 1252 (5th Cir. 1987).

Contrary to respondent's remarks in her Brief in Opposition, there is a definite conflict between the decision

below and that in *Frazar*. Further, it is a conflict about a fundamental issue of federal jurisdiction which this Court should resolve.

II. IN PARTICULAR, FOR CLAIMS OF MEDICAID EPSDT VIOLATIONS BROUGHT PURSUANT TO § 1983, THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER A CLAIM BASED UPON LACK OF "EFFECTIVE" INFORMING ABOUT EPSDT IS JUSTICIABLE UNDER *EX PARTE YOUNG*.

Respondent alleges in her complaint that her federal rights are being violated because petitioners do not "inform effectively" eligible persons about EPSDT availability. The court below found federal jurisdiction under *Ex parte Young* to litigate that claim.

Quite to the contrary, *Frazar* determined that EPSDT provisions generally do not create federal rights. The court's logic is as follows: Congress did not intend for a federal court to require that a state participating in the Medicaid program must always provide every EPSDT service to every eligible person at all times. *Id.* at 544. Congress limited the success required from various EPSDT provisions to meeting the performance standards set by the federal Secretary. *Id.* at 546. Therefore private parties cannot sue under § 1983 to require a state to meet such EPSDT participation or performance standards, because state compliance with such standards is not an individual right actionable under § 1983. *Id.* at 545 (citing *Blessing* v. *Freestone*, 520 U.S. 329, 343-44 (1997)).

More particularly, *Frazar* observed that nothing in the EPSDT statute expressly requires the "effective" conveyance of information. The absence of such a statutory requirement, coupled with the fact that the degree of success required of a

state's information efforts is within the performance standards set by the Secretary, led the court to conclude that the district court lacked jurisdiction to enforce an "effective" information standard against state officials. *Id.* at 546.

To say there is no conflict among the circuits on this question when the lack of "effective" information is precisely among the claims left intact by the decision below is highly erroneous.

CONCLUSION

For the foregoing reasons, and for those set forth in the petition itself, this Court should grant the petition for writ of *certiorari.*

Respectfully submitted,

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